In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 634

FOREMOST DAIRIES, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a–17a) is reported at 348 F. 2d 674. The opinion and order of the Federal Trade Commission (R. 32–43)[1] have not been officially reported.

JURISDICTION

The judgment of the court of appeals affirming the Commission's order was entered on July 14, 1965, and the final decree enforcing that order was entered on August 5, 1965. The petition for a writ of certiorari was filed on October 1, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "R" refers to the joint Record filed in the court below.

702-145—65

QUESTION PRESENTED

Whether the Commission's order prohibiting the petitioner from engaging in discriminatory pricing practices in violation of the Robinson-Patman Act was supported by substantial evidence that petitioner's sales were in interstate commerce and that the effect of its practices might be substantially to lessen competition.

STATUTE INVOLVED

Section 2(a) of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13(a), provides in pertinent part:

> [I]t shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce * * * and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them * * *.

STATEMENT

Petitioner is a New York corporation engaged in the processing, manufacture, distribution and sale of milk and other dairy products throughout the United States (R. 11). About 20 percent of the raw milk processed at petitioner's Santa Fe, New Mexico, proc-

essing plant[2] is produced in Colorado (Pet. 5). After the milk is processed—a procedure requiring less than one hour—it is trucked to petitioner's distributing outlets in Albuquerque, New Mexico, and is sold to Foremost's retail customers in that city (R. 48, 51, Pet. 5a).

Beginning in November, 1959, petitioner allowed one Albuquerque supermarket chain—Barber's Stores—a 5 percent price discount on sales of milk (Pet. 6-7; R. 20). Foremost offered the price concession after it was dropped as a supplier of the Barber's chain (R. 21). The discount was discontinued in December, 1961, when petitioner learned that its competitors had cancelled their discounts to Barber's (R. 70).[3] The price advantage to Barber's—in the form of cash rebates—totalled $7,627 for the period November, 1959, through April, 1961 (Pet. 7). Similar concessions were not awarded to most of petitioner's other customers in Albuquerque (Pet. 3a).[4]

The Federal Trade Commission instituted proceedings against petitioner under the Robinson-Patman Act (Section 2(a) of the Clayton Act, as amended, 15 U.S.C. 13(a)) in April, 1959 (R. 1-6). After full hearings, the examiner found, and the Commission

[2] Foremost maintains 59 processing plants located in 24 States (R. 12).

[3] The Commission rejected petitioner's attempt to defend the discount under the "meeting competition" defense of the Robinson-Patman Act, 15 U.S.C. 13(b), and Foremost does not challenge that conclusion here (Pet. 6).

[4] Although petitioner granted discounts to two other retail chain stores, the Commission found that these discounts had not violated the Act (R. 35).

agreed, that petitioner's sales of milk in Albuquerque were in interstate commerce, that the effect of the 5 percent rebate might be substantially to lessen, injure, destroy or prevent competition and that petitioner's price discrimination therefore violated the Act (R. 34–43).[4] A cease and desist order was entered, prohibiting Foremost from "discriminating * * * in the price of fluid milk of like grade and quality by selling to any purchaser at net prices higher than the net prices charged any other purchaser who competes with the purchaser paying the higher price" (R. 33).

The court of appeals unanimously affirmed (Pet. 1a–17a). It concluded that the Commission had jurisdiction under the Act since petitioner's shipments of milk to its Albuquerque customers had "such significant interstate incidents" as to constitute purchases in interstate commerce (Pet. 9a). The court also held that the Commission was warranted in inferring a probable injury to competitors "in the circumstances and in light of the industry setting" (Pet. 10a–16a).

ARGUMENT

1. Petitioner's principal complaint is that the finding of probable competitive injury in this case extends the scope of the Robinson-Patman Act by condemning price discriminations *per se*, since the "only

---

[4] The Commission's complaint alleged that the price discrimination included, but was not limited to, sales in various Texas cities (R. 4). Hearings held in 1959 failed to support the Texas charges, and the examiner dismissed the complaint as it related to violations in Texas (R. 19). The hearing resulting in the finding of price discrimination in the Albuquerque area was commenced in 1962.

evidence * * * relating to competition in milk with the Barber's stores [petitioner's favored customer] was the testimony of a single witness who stated that he competed with one Barber's store which had been open for less than a month before all discounts were abandoned" (Pet. 8–10). Petitioner urges that the decision below therefore "dispenses with the need for any substantial evidentiary support for the finding of probable competitive injury in secondary-line cases" (Pet. 8).

As the Commission found, however, the existence of competition between petitioner's favored and disfavored customers (generally located in different sections of Albuquerque) was established, not only by "the opening, during the period of the discounts, of a new Barber's store in close proximity to its disfavored competitors," but also by "the testimony that one of these competitors drew its customers 'from all over Albuquerque'" (R. 37). In addition, this disfavored competitor testified that lowering the price of milk by 3 to 5 cents a half-gallon would cause customers to switch from one Albuquerque store to another (R. 59). The court of appeals therefore correctly held that the Commission had properly "viewed the entire Albuquerque area as the market in which competition suffered probable injury" since "[i]n the grocery business, where competition is keen and profit margins are low, customers may often drive to relatively distant retail outlets if significant price differences or alluring bonuses are made available" (Pet. 15a–16a).

Having found that petitioner's favored and disfavored stores were in competition, the Commission properly concluded that the requisite probability of injury through petitioner's price discrimination was present. This Court long ago established that the Commission is warranted, without evidence of specific financial losses, in finding injury to competition from evidence of a practice under which a seller charges one buyer a lower price for goods than he charges the purchaser's competitors for goods of like quality. *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 46–47, 50–51.[4]

2. Petitioner also urges that the discriminatory sales were entirely local and therefore outside the purview of the Act (Pet. 10). As noted in the Statement, *supra*, pp. 2–3, about one-fifth of the milk sold by petitioner in Albuquerque originates in Colorado. After the milk is received at petitioner's processing plant in New Mexico, it is tested, standardized, pas-

[4] Petitioner erroneously argues that the decision below is contrary to *American Oil Co.* v. *Federal Trade Commission*, 325 F. 2d 101 (C.A. 7). That case involved price concessions granted during a gasoline price war that continued for only seven days. The court in *American Oil*, as did the court below, recognized that price discrimination does not *per se* violate the Act (325 F. 2d at 104; Pet. 13a). However, in holding that there was no evidence that the lower price charged some dealers was the probable cause of injury to competing purchasers, the court there stressed the short duration of the practice and held that "there must be something more than an essentially temporary minimal impact on competition" (*id.* at 106). Here the unlawful rebates continued for two years, and there was evidence that at least one non-favored purchaser was injured as a direct result.

teurized and bottled, and then transported to petitioner's customers (R. 47). This entire procedure of preparing the out-of-state milk for market was estimated to consume from "a few minutes up to possibly an hour" (R. 48). Thus, the court below correctly held that the milk sold by petitioner in New Mexico was "in commerce" since it moved "in a constant flow from the Colorado Dairy farms to meet the fairly predictable demands of the retail grocers in Albuquerque" (Pet. 6a, 8a) (cf. *Standard Oil Co.* v. *Federal Trade Commission*, 340 U.S. 231, 236–238). A contention identical to petitioner's argument in this case was also rejected in *Pevely Dairy Co.* v. *United States*, 178 F. 2d 363, 366 (C.A. 8), certiorari denied, 339 U.S. 942. See also *United States* v. *Universal Milk Bottle Service, Inc.*, 85 F. Supp. 622, 627–629 (S.D. Ohio, affirmed, 188 F 2d 959 (C.A. 6).[1]

[1] There is no merit to petitioner's attempt to distinguish *Pevely Dairy Co.* and *Universal Milk* on the ground that both involved indictments under the Sherman Act where the government must prove only that the transactions affected interstate commerce (Pet. 12–13). The court below correctly observed that, in upholding the indictment in *Pevely*, the court necessarily found that the milk was in commerce since the indictment alleged only that the defendants conspired to fix the price at which milk was sold in Missouri, and that the restraint had the effect of stabilizing the price in St. Louis. For other cases finding local sales of products to be in interstate commerce notwithstanding local processing, see *United States* v. *South Florida Asphalt Co.*, 329 F. 2d 860 (C.A. 5), certiorari denied *sub nom. Wright, Inc., et al.* v. *United States*, 379 U.S. 880; *Plymouth Dealers' Ass'n* v. *United States*, 279 F. 2d 128, 135 (C.A. 9).

Contrary to petitioner's contention, the decision below is not in conflict with decisions of other courts of appeals. The cases cited in the petition concerned products manufactured by processes in which raw materials shipped interstate were substantially transformed during the manufacturing process by being combined with other substances to produce new products, which were then sold intrastate.[4] In the present case, the Colorado milk, though purified and bottled in New Mexico so as to be ready for consumption, was not thus combined or altered into a different product after reaching New Mexico.

[4] Thus, in *Brosious* v. *Pepsi-Cola Co.*, 155 F. 2d 99 (C.A. 3), the syrup concentrate, one ingredient used in manufacturing soft drinks, was held to be no longer in commerce after it was compounded with other substances produced intrastate which made up the bulk of the final product. Similarly, in *Ewing-Von Allmen Dairy Co.* v. *C and C Ice Cream Co.*, 109 F. 2d 898 (C.A. 6), involving an alleged conspiracy to monopolize the ice cream cone business in Kentucky, the court noted that the bulk of the raw materials came from Kentucky, and that while the gelatin, fruits, and some milk were produced without the state, these ingredients ceased to be a part of interstate commerce when manufactured into the final product. The same reasoning applied in *Lawson* v. *Woodmere*, 217 F. 2d 148 (C.A. 4), where some of the raw materials used in manufacturing burial boxes and vaults came from different states. Finally, *Central Ice Cream Co.* v. *Golden Rod Ice Cream Co.*, 287 F. 2d 265 (C.A. 7), turned on the fact that the defendant charged different prices for high and lower quality ice cream. Accordingly, the sales were outside the scope of the Section 2(a) requirement that the sales be of "like grade and quality."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.
DONALD F. TURNER,
Assistant Attorney General.
LIONEL KESTENBAUM,
JERRY Z. PRUZANSKY,
Attorneys.

JAMES McI. HENDERSON,
General Counsel,
J. B. TRULY,
Assistant General Counsel.
Federal Trade Commission.

NOVEMBER 1965.

END